

WILLIAM J. THOMAN
v.
BUREAU OF LAND MANAGEMENT
ROBERTS RANCH, ET AL., INTERVENORS

IBLA 90-411

Decided September 9, 1991

Motion to place in full force and effect on appeal a decision of Administrative Law Judge John R. Rampton, Jr., affirming decisions of the Green River (Wyoming) Resource Area suspending grazing permits and preferences, assessing fees for grazing trespass, and denying a grazing application. WY-04-88-1, WY-04-89-2.

Referred for hearing.

1. Administrative Procedure: Hearings--Evidence: Sufficiency--Grazing Permits and Licenses: Appeals--Hearings--Rules of Practice: Appeals: Hearings

A decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists. When the record is not adequate for the Board to determine whether such a situation exists, it may refer the question for hearing, findings of fact, and conclusions of law.

APPEARANCES: William F. Schroeder, Esq., Vale, Oregon, and W. Alan Schroeder, Esq., Boise, Idaho, for appellant; Calvin E. Ragsdale, Esq., Green River, Wyoming, for intervenors; Glenn F. Tiedt, Esq., Office of the Regional Counsel, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

William J. Thoman has appealed the decision of District Chief Administrative Law Judge John R. Rampton, Jr., that affirmed two decisions of the Area Manager, Green River Resource Area, Bureau of Land Management (BLM), one dated August 17, 1988, demanding approximately \$5,400 in payment for repeated willful grazing trespasses WY-048-3-853 and WY-048-3-854 and suspending grazing permits and grazing preferences in the Highway Gasson and Eighteen Mile Allotments, and the other dated May 12, 1989, denying in part

a grazing application for these allotments. Thoman appealed the BLM decisions in accordance with 43 CFR 4.470 and 4160.4. After conducting a hearing in July and September 1989, Judge Rampton issued his decision on May 10, 1990. Thoman filed a timely notice of appeal to the Board.

On June 4, 1991, BLM filed a request, pursuant to 43 CFR 4.477(b)(3), to place the May 10, 1990, decision of Judge Rampton in full force and effect while this appeal is pending

to the extent that it provides that the existing allotment management plans control current grazing authorizations in the Highway-Gasson and Eighteenmile Allotments (Dec. 12) including William Thoman's, and that any rights acquired by Mr. Thoman in those allotments from others are subject to the provisions of terminating leases from which rights were acquired (Dec. 12). This will allow all parties to this proceeding to conduct their current activities within the predictable framework of existing plans and authorizations while the Board considers whether Mr. William Thoman has the additional rights he claims, together with all of the other issues raised in this appeal.

Thoman opposes the request, arguing that exercise of the authority in section 4.477(b)(3) must be consistent with the provisions of 43 CFR 4160.3, and that no emergency exists as required by the latter regulation.

The first of these regulations, 43 CFR 4.477, was revised in 1979 to make it consistent with amendments to 43 CFR 4160.3 adopted the previous year. ^{1/} 43 CFR 4.477 currently provides:

§ 4.477 Effect of decision suspended during appeal.

(a) An appeal shall suspend the effect of the decision from which it is taken pending final action on the appeal unless the decision appealed from is made immediately effective.

(b) Consistent with the provisions of § 4160.3 of this title, (1) the authorized officer may provide initially in his decision that it shall be in full force and effect pending decision on an appeal therefrom; (2) the administrative law

^{1/} See 44 FR 41790 (July 18, 1979). In 1978, 43 CFR 4160.3(c) was amended to read: "Final decisions shall be in full force and effect only if required for the orderly administration of the range or for the protection of other resource values. See § 4.477 of this title." 43 FR 29075 (July 5, 1978). In 1978, 43 CFR 4.477(b) provided: "When the orderly administration of the range or other public interest so requires, * * * (3) the Board may provide by interim order that any decision from which an appeal is taken shall be in full force and effect pending final decision on the appeal."

judge may provide in the decision on an appeal before such officer that it shall be in full force and effect pending decision on any further appeal; (3) the Board may provide by interim order that any decision from which an appeal is taken shall be in full force and effect pending final decision on the appeal. Any action taken by the authorized officer pursuant to a decision shall be subject to modification or revocation by the administrative law judge or the Board upon an appeal from the decision. [Emphasis added.]

43 CFR 4160.3 was subsequently amended in 1984 to read:

§ 4160.3 Final decisions.

* * * * *

(c) A period of 30 days after receipt of the final decision is provided for filing an appeal. Decisions that are appealed shall be suspended pending final action except as otherwise provided in this section. * * * The authorized officer may place the final decision in full force and effect in an emergency to stop resource deterioration. Full force and effect decisions shall take effect on the date specified, regardless of an appeal. [Emphasis added.]

The comment published with this amendment stated:

Additional comments opposed the proposed language for § 4160.3(c), which provided authority for the authorized officer to place decisions in full force and effect only in an emergency. The comments expressed the view that the Bureau of Land Management should retain authority to place decisions in full force and effect for other than emergency reasons. The Department of Interior has concluded that the authority to place decisions in full force and effect should be utilized only in emergency situations to stop resource deterioration. Therefore, the proposed language is adopted in final rulemaking.

49 FR 6448 (Feb. 21, 1984).

[1] It is thus apparent that a decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists.

BLM's Reply to Thoman's Response to BLM's request to place Judge Rampton's decision into full force and effect states:

An emergency exists. There is an emergency need to stop Resource deterioration in the riparian zone of the Big Sandy

River in the Highway-Gasson and Eighteenmile Allotments by requiring William Thoman together with all the other permittees to conduct his grazing activities in compliance with the allotment management plans [AMPs]. Mr. Thoman's spring use in 2 of the last 3 years has been out of compliance with the AMPs in a time of severe drought conditions, and "continued heavy use by lambing sheep will accelerate the current degradation of the riparian community along the Big Sandy River" (Gov. Ex. 109). Mr. Thoman applied for spring lambing use inconsistent with the AMPs in both 1990 and 1991, and apparently will continue to do so until this appeal is resolved.

(Reply at 3).

Exhibit G-109 is a July 12, 1989, Memorandum prepared by BLM Range Conservationist James M. Sparks entitled "Vegetative Utilization in the Highway Gasson and Eighteenmile Allotments after the Lambing Season." It is a report of utilization studies conducted along the Big Sandy River in these allotments on June 16, 1989. "At the time of this inspection, the only livestock to have grazed in these allotments were Bill Thoman's lambing ewes and several bands of trailing sheep belonging to the Arambels" (Memorandum at 1). The Memorandum states that "[u]tilization was not uniform, and was to [sic] centered in those areas where a drop band of sheep was located for an extended period." *Id.* 2/ After indicating levels of utilization of riparian and upland species in two particular areas, the Memorandum concluded:

Utilization was similar to both of the above locations anywhere drop bands of sheep grazed. Many areas of both allotments showed very little use at all, especially where steep cliffs were present. My observations indicate that continued heavy use by lambing sheep will accelerate the current degradation of the riparian community along the Big Sandy River. Nearly all observations of *Salix* spp. (willows) on the entire length of the river are low in vigor and exhibiting minimal reproductive activity. Most of the

2/ In his testimony at the hearing before Judge Rampton, Sparks elaborated:

"Q. [By Mr. Schroeder, counsel for Thoman] But your observation is that where the drop band was resident, that's where the heavier utilization was; is that it?

"A. Drop groups; drop bands. Where there was sheep concentrated on the river.

"Q. And concentrated means concentrated as a residence for a significant period of time?

"A. Yes.

"Q. Yeah. But overall the utilization was light to moderate?

"A. As taking the river as an average."

(Transcript, Volume V, July 21, 1989, at V-231).

Saline Lowland sites are being invaded by inland saltgrass, while losing alkali sacaton and alkali saltgrass.

Id. at 2. 3/

Thoman argues BLM has not justified the existence of an emergency situation:

First, as to the riparian concern, the same BLM office within the same riparian area (Big Sandy River) permitted another livestock permittee to trail 4,244 sheep within the Eighteenmile Allotment. * * * This grazing use was permitted outside the prescription of any grazing/trailing preference and any AMP. * * * No riparian concern exists in the eyes of the BLM because this same BLM has authorized excess grazing use within this riparian zone.

(Appellant's Supplemental Reply at 2). 4/ Thoman attached a copy of a BLM invoice to the Big Sandy and Green River Livestock Company for trailing 4,244 sheep from January 2-3, 1991, through the Eighteenmile Allotment. The invoice does not indicate specifically where the sheep were trailed.

The Board has discretion to refer a matter to an Administrative Law Judge for a hearing on an issue of fact. 43 CFR 4.415. We "should grant a hearing when there are significant factual or legal issues * * * to be decided and the record without a hearing would be insufficient for resolving them." Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977). If we refer a matter for hearing, we are to specify the issues upon which the hearing is to be held. 43 CFR 4.415; see Norman G. Lavery, 96 IBLA 294, 299 (1987).

We find the record in this case is not adequate for us to determine whether an emergency situation involving resource deterioration currently exists in the riparian area of the Big Sandy River. We therefore refer

this question to the Hearings Division for a hearing and the submission to the Board of findings of fact and conclusions of law. The parties may file responses to the findings and conclusions with the Board within 30 days

3/ In his testimony, Sparks elaborated:

"Q. [By Mr. Tiedt, counsel for BLM] If spring use -- spring lambing use is made year after year after year in the same area, what would that have -- what effect would that have on the total system along the river in regard to the palatable versus the unpalatable species?

"A. I would say that there would be a presence of more unpalatable species and less desirable plants."

(Transcript, Volume V, July 21, at V-159).

4/ Thoman adds: "Second, as to the applications for use, the same BLM office has denied any and all applications for grazing use by Mr. Thoman that in the BLM's opinion is outside the prescription of any AMP. No licensing of use has thereby occurred." Id.

30 days of the date they are received. We retain jurisdiction over the appeal of Judge Rampton's May 10, 1990, decision and will decide whether to place that decision into full force and effect based on the findings and conclusions, and any responses that are filed.

Will A. Irwin
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge